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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of HETTIE SUE and LEE ALLEN.	
HETTIE SUE ALLEN, Appellant, v. LEE ALLEN, Respondent.	G040334 (Super. Ct. No. 02D008561) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard Vogl, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Offices of Pittullo, Howington, Barker & Abernathy and Joseph W. Howington for Appellant.

Law Office of Patrick O'Kennedy and Patrick O'Kennedy for Respondent.

Hettie Sue Allen appeals from the judgment in this action that dissolved her marriage to Lee Allen. Hettie[1] argues the trial court erred in two respects: by applying the wrong standard in determining the value of community property furnishings which she took from the marital home when she moved out; and by charging her for the difference between the $700,000 appraised value of the marital home, and the ultimate sale price of $636,000. We find neither contention persuasive, and affirm the judgment.

First, as Hettie acknowledges, the $50,000 value placed on the furniture she took was apparently supported by Lee's testimony. He is expressly qualified to offer such an opinion pursuant to Evidence Code section 813, and thus, even in the absence of expert appraisal evidence, his testimony was sufficient to support the court's conclusion as to value. And the credibility to be afforded Lee's opinion was a matter to be decided by the trial court. We cannot reassess that issue on appeal.

Similarly, the issue of whether the court properly determined Hettie should be charged with the decrease in the value of the marital home is not, as she contends, an issue of law. It is, at best, a mixed issue of fact and law, and thus we cannot conclude the court erred without a complete record of the evidence submitted to it in connection with the issue. While it may be true the decrease in the home's value was not *necessarily* caused (at least in its entirety) by the fact Hettie had allowed her daughter to trash the home, as long as that was a reasonable inference for the court to draw from the evidence before it, the court was free to make that finding. Likewise, the court's determination that Hettie's conduct in allowing the trashing to occur amounted to gross negligence, and thus qualified as a breach of fiduciary duty, is essentially a factual one, subject to challenge only on the basis it is unsupported by substantial evidence. Because we have no idea what evidence was before the court pertaining to the extent to which Hettie's daughter trashed the home; the extent to which Hettie knew about it; or what Hettie did or

[1] Because the parties share the same last name, we refer to each by their first name for the sake of clarity. No disrespect is intended.

did not do in response to that knowledge, we are in no position to conclude the trial court abused its discretion in concluding Hettie's conduct amounted to gross negligence.

FACTS

The vanishingly thin record in this case establishes that Hettie filed her petition for dissolution in August of 2002. A judgment of dissolution, status only, was filed on January 13, 2004. The court reserved jurisdiction over all other issues of the marriage, including the value and division of community property, for later determination.

In January of 2006, the court appointed a referee pursuant to Code of Civil Procedure section 639, subdivision (a), to assess and report back to it on various disputed matters.[2] According to the referee's report, he requested certain documentation from each of the parties, and then met with them "for over three hours" in February of 2006. After some interim effort to settle the remaining disputes proved unsuccessful, the referee resumed the hearing on March 28, 2006. Hettie, however, did not appear for that second session; and after concluding that her nonappearance was unjustified, the referee continued with the hearing in her absence.

With respect to the value of the marital residence, the referee's report states "[a]t our hearing on February 24, 2006, the parties were in concert that upon reaching an agreement on the current value of the [marital residence], or upon this Referee making that determination, they would be able to reach a settlement whereby Ms. Allen would 'buy out' Mr. Allen's interest in the residence. I instructed them to either agree to the

[2] Code of Civil Procedure section 639, subdivision (a), provides: "When the parties do not consent, the court may, upon the written motion of any party, or of its own motion, appoint a referee in the following cases pursuant to the provisions of subdivision (b) of Section 640: [¶] (1) When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein. [¶] (2) When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect. [¶] (3) When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action. [¶] (4) When it is necessary for the information of the court in a special proceeding. [¶] (5) When the court in any pending action determines that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon."

identity of an appraiser, or each of them would have to purchase an updated appraisal, since the one Mr. Allen had previously obtained was over a year old. Mr. Allen did obtain a new appraisal[], which places a current value on the property of $700,000. Ms. Allen did not provide this Referee with an appraisal. . . . [Mr. Allen's] appraisal is competent and provides a reasonable basis for this Referee to conclude the current value of the [marital] residence is $700,000. This Court may choose to adopt this value, if this Court decides a determination of the *value* of the community assets identified by this Referee is within the scope of the issues to be decided by this Referee." The referee further noted that Hettie was receiving $2,000 per month in rental income, which the referee assumed was coming from "her daughter, who is living in the [marital residence.]"

With respect to the community property furniture, the referee's report states that "[s]ometime after the Date of Separation, Mr. Allen went to the family . . . residence. He took photographs and videotaped the furniture and other personal property items in the residence, and he made a list of the property, which he titled, 'As I Walk Through the House.' . . . Some of the items there listed, Mr. Allen has in his possession. . . . [¶] Mr. Allen claims that all of the other items on this list have been disposed of, transferred to another location, or are otherwise accounted for only with information in the possession of Ms. Allen. Mr. Allen values the furniture and other items at $50,000. I informed Mr. Allen that in order for the Court to put a value on this property, it will be necessary to have an expert appraiser value the property. If, in fact, Ms. Allen has disposed of any of this property, the appraiser will have to rely upon the photographs and videotape of the property, together with other information about the purchase prices and condition of the individual items, in order to arrive at a valuation. To the extent Ms. Allen's disposal of any item of property renders the valuation of it more difficult, any question about its value should be resolved against her interests."

The case was then set for a trial before the court in February of 2008. Each side filed a trial brief. Hettie's trial brief argued that it was inappropriate to charge her for the difference between the $700,000 appraised value of the home at the time of the referee's report, and the $636,000 price the home later sold for. She argued she had "done nothing to damage the property," and that her own expert "suggests that the property was worth $690,000 at the time of sale and the costs of repairs total $20,000 . . . includ[ing] a new roof and dry rot. Both of these factors can be attributed to general wear and tear and not to waste by Petitioner to support charging her with the reduction."

For his part, Lee argued that in the wake of the parties' separation, the marital property had been in Hettie's possession, and she had "abandoned the residence, moving to northern California, and allowing her daughter and other persons to occupy the residence. . . . In summary, the residence was literally trashed, [Hettie] failed to make the mortgage payments, and the house went into foreclosure. [¶] [Lee] sought and obtained an Order from the Court to take possession of the residence. He brought the mortgage current . . . . He cleaned up the property, spent over $2,500 in repairs and the home was sold for approximately $633,000. . . . [¶] Whether the reduced value of the property is due to property values declining while [Hettie] stalled this case by not providing disclosures and not paying the mortgage, or because of the condition of the property, [Hettie] is responsible for the reduced sale price, as she violated her duty to maintain the asset."

In his trial brief, Lee also requested that "he be reimbursed for one half of the value of furniture that [Hettie] removed from the family residence, which he values at $50,000."

Our record includes no information about what occurred at the trial, other than the judgment itself, which reflects that the trial took place on February 5, 2008, and that both parties were present in court. With respect to the issue of furniture valuation raised by Hettie in this appeal, the judgment states: "Furniture [¶] The Court finds that

[Hettie] had knowledge that the issue of the value of the furniture was disputed. [¶] The Court orders that [Lee] shall be awarded $50,000 in community funds to match the $50,000 in furniture taken by [Hettie.] [¶] The Court rejects the self-serving offer of [Hettie] to deliver to [Lee] the furniture at the value placed by [Lee] on the items."

With respect to the court's decision to charge her with the depreciated value of the marital residence, also raised by Hettie in this appeal, the judgment states: "The House and Breach of Fiduciary Duty: [¶] The court finds that at the date of March of 2006, the value of the realty was $700,000. [¶] The court finds that [Hettie] had sole use, possession and control of the realty. She had placed a tenant in the property. She had made all the payments for the mortgage and related costs since the parties' separation until she stopped paying in August of 2006. The court finds that the tenants at the realty 'trashed' the property and caused the value to be less due to the condition of the property. [¶] The court finds that the property sold for $636,000 in July of 2007. [¶] The court finds that that there was a net $64,000 loss to the community. [¶] The Court finds that in permitting a tenant to "trash" the house, [Hettie] committed gross negligence, not ordinary negligence. [¶] The court finds that [Hettie] breached her fiduciary duty and that in order to cure the inequity, [Lee] should be awarded an additional $32,000 from the division of the realty sales proceeds."

I

Hettie first argues the court "applied the wrong standard of proof" in concluding the furniture she took from the marital residence had a value of $50,000. She points out that Family Code section 2552, subdivision (a) requires that "[f]or the purpose of division of the community estate upon dissolution of marriage or legal separation of the parties . . . the court shall value the assets and liabilities as near as practicable to the time of trial," and contends that assuming the court followed that requirement, it would have erred in "plac[ing] a value upon furniture, the majority of which were not antiques,

at a value equal to the price which was originally paid for it. Unless used furniture is an antique, it will significantly reduce in value, not maintain it."

However, without an evidentiary record, we have no basis for evaluating this claim. Hettie points to nothing which establishes the court actually assessed the non-antique furniture at a value "equal to the price which was originally paid for it." Nor does she foreclose the possibility that the court might have concluded that whichever "antique" pieces were included among the furniture Hettie took had actually increased in value since that time, and that such an increase was sufficient to offset the decreased value of the remaining pieces. Because "[a] judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness" (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133), and Hettie has failed to provide us sufficient information to foreclose those inferences favorable to the court's ultimate determination, we simply cannot conclude the court erred in reaching it.

Hettie also complains that even though the referee's report stated Lee would have to back up his own estimate as the value of the furniture with an expert appraisal, the trial court imposed no such requirement. She argues that "[i]f the court wished to adopt the recommendation of the Referee, it must adopt the entire recommendation." However, Hettie cites no authority for that "all or nothing" rule of referee recommendations, and we are certainly aware of none. In fact, to the extent Hettie is arguing that the trial court could not adopt the furniture valuation given to the referee, without also adopting the referee's legal conclusion that an expert appraisal would be required, that is clearly incorrect. A reference under Code of Civil Procedure section 639 is limited to factual, rather than legal, issues (*In re Marriage of Lloyd* (1997) 55 Cal.App.4th 216, 221), and thus the referee's opinion as to the type of evidence required to establish the furniture's value was not entitled to any weight.

Instead, the issue was governed by Evidence Code section 813, which expressly provides that "[t]he value of property may be shown" by the opinion of, among others, "[t]he owner or the spouse of the owner of the property or property interest being valued." (Evid. Code, § 813, subd. (a)(2).) Thus, despite the referee's conclusion that an expert appraisal of the furniture would be required to establish value, the trial court acted in accordance with the law when it apparently determined that Lee's testimony, standing alone, would suffice.

And we say "apparently determined," because as we have already explained, we actually have no way to assess the state of the evidence submitted to the court on the point. While the court's proposed decision recites that Lee "has testified" regarding the value of the furniture, "plac[ing] a value of $50,000 on the items taken by [Hettie]," and that the court viewed his testimony as having "credibility," it says nothing about whether other evidence was offered as well. Consequently, because we are obligated to presume the judgment is correct, even if we were to agree with Hettie's assertion that more evidence had been required, we would have no choice but to assume that additional evidence was submitted and affirm the judgment on that basis.[3]

Hettie's final argument, that "the evidence only suggests [Lee's] opinion was based on purchase price," rather than on the furniture's "fair market value," fails for similar reasons. Without an evidentiary record, we cannot evaluate what the "evidence suggests." And even if we could, anything short of a conclusive demonstration that Lee's valuation opinion – and thus the court's conclusion – was based on the wrong standard, would be insufficient to warrant a reversal. The mere fact the evidence might "suggest" some conclusion other than the one the court reached demonstrates only that the point is a disputed one. Such disputes are for the trial court – not us – to resolve.

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[3] Similarly, we must reject Hettie's assertion that Lee's testimony regarding valuation did not incorporate any of the factors identified in Evidence Code section 814 as comprising the type of information "that reasonably may be relied upon by an expert in forming an opinion as to the value of property." (Evid. Code, § 814.) We have no way of discerning what Lee's testimony incorporated.

II

Hettie's second contention is that the trial court erred in penalizing her for the $64,000 reduction in the value of the marital home, between the time that Lee obtained his $700,000 appraisal and the time the home was finally sold in July of 2007. Among other things, Hettie complains "[t]here was never any proffered evidence that any damage caused by the tenants reduced the value of the house by $64,000." But as we have already explained, we are required to presume, in the absence of a complete evidentiary record, that there was.[4]

Likewise, the fact that Hettie may have obtained her own appraisal, concluding the property was worth $690,000 even after Lee had retaken possession in the wake of its "trashing" (as she claims), would not conclusively demonstrate that the house had not been significantly damaged during her daughter's tenancy, as she appears to believe. The trial court may have concluded that Hettie's proffered appraisal was not credible, for any number of reasons we could only speculate about. And the fact the evidence might also have suggested "market factors played the main role in the diminution in value of the home" indicates only that the evidence may have been disputed – a far cry from the factual showing required to justify a reversal in this case.

Hettie also argues that even assuming the reduction in the home's value was attributable to the damage inflicted upon it during the period of her daughter's tenancy, the court erred in characterizing Hettie's own conduct – what the court described as "permitting a tenant to 'trash' the house" – as amounting to gross negligence. Hettie points out that, as explained by our Supreme Court in *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754, "'Gross negligence' long has been defined in

[4] Hettie also asserts there was no basis for the court to have penalized her for alleged dilatory tactics which delayed the sale of the marital home, and supplied Lee with an alternative argument to justify holding her responsible for its diminution in value. However, because the court's judgment gives no indication that it relied upon this alternative argument as a basis for charging Hettie – and because we conclude there is no basis for rejecting the rationale the court did rely upon – we do not address it.

California and other jurisdictions as either a '"'want of even scant care'"' or '"'an extreme departure from the ordinary standard of conduct.'"'" (Quoting *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1185-1186.) Hettie then simply asserts that "[c]learly any damage to the residence in this case was an unintentional act on [her] part," and thus could not be characterized as meeting the definition of gross negligence.

But of course, Hettie's assertion as to what facts are clear in this case cannot be considered in the absence of a factual record. For all we know, she was actually aware that her daughter was in the process of destroying the house from within, and affirmatively decided to acquiesce in that destruction. Hettie would certainly not be the first family court litigant to decide, expressly or implicitly, that destroying her own property would be a reasonable sacrifice to make, so long as it entailed the destruction of her former spouse's interest as well. And the fact Hettie ultimately defaulted on the home's mortgage, and allowed it to go into foreclosure before Lee was ultimately able to retake possession, suggests that she may well have been prepared to sacrifice the home entirely. On this record (or lack thereof), we simply cannot quibble with the trial court's determination of gross negligence.

Hettie's final argument is that her decision to lease the home to her daughter must be viewed as an effort to "benefit" the marital community, and thus any losses suffered in connection therewith are required by Family Code section 1000, subdivision (b)(1), to "first be satisfied from the community estate and second from the separate property of the married person." We disagree. Even assuming the application of Family Code section 1000 to this situation was raised as an issue by Hettie in the trial court, and that it would apply to this situation in the manner she suggests, we could not second-guess the trial court's implicit factual determination that Hettie's decision to lease the home to her daughter was not actually intended to "benefit" the marital community, as she suggests. Alternatively, the court may have concluded that while Hettie's initial

decision to lease the home was intended to benefit the community, her subsequent decision to "permit" the tenant (her daughter) to trash the place was not. We would not quibble with that analysis, and thus find no basis to overturn the trial court's decision.

The judgment is affirmed. Lee is to recover his costs on appeal.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.